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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

LYNN BARTON, on behalf of herself and all others
similarly situated,

Plaintiff,

vs.

FIDELITY NATIONAL FINANCIAL, INC., et al.

Defendants.

Case No. 08-CV-01341 JSW

**DECLARATION OF ALEX C. TURAN
IN SUPPORT OF ADMINISTRATIVE
MOTION TO CONSIDER WHETHER
CASES SHOULD BE RELATED**

THIS DOCUMENT RELATES TO:

RUBEN ROMERO and SARAH YAHN, on behalf of
themselves and all others similarly situated,

Plaintiffs,

vs.

FIDELITY NATIONAL FINANCIAL, INC., et al.,

Defendants.

Case No. 08-CV-03391 EMC

1 I, Alex C. Turan, declare as follows:

2 1. I am a member in good standing of the California State Bar and an attorney at the law
3 firm of Girard Gibbs LLP, counsel of record for Plaintiffs in *Ruben Romero, et al. v. Fidelity National*
4 *Financial, Inc., et al.*, Case No. C 08-03391 EMC. I make this declaration based on my personal
5 knowledge, and if called to testify to the contents, I could and would competently do so.

6 2. Attached as Exhibit A is a true and correct copy of the class action complaint filed on
7 March 10, 2008 in *Barton v. Fidelity National Financial, Inc., et al.*, Case No. 08-CV-01341 JSW,
8 and assigned to the Honorable Jeffrey S. White.

9 3. Attached as Exhibit B is a true and correct copy of the class action complaint filed on
10 July 14, 2008 in *Romero, et al. v. Fidelity National Financial, Inc., et al.*, Case No. 08-CV-03391
11 EMC.

12 4. Defendants that have been sued in *Romero* have yet to appear in the action. Local Rule
13 3-12 requires an Administrative Motion to Consider Whether Cases Should Be Related to be filed
14 promptly. Therefore, a stipulation could not be entered prior to the filing of Plaintiffs' Administrative
15 Motion.

16 I declare under penalty of perjury that the foregoing facts are true and correct and that this
17 declaration was executed this 16th day of July, 2008, in San Francisco, California.

18
19 By: /s/ Alex C. Turan
20 Alex C. Turan
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CERTIFICATE OF SERVICE

I, Alex C. Turan, hereby certify that on July 16, 2008, I filed the following document(s):

1. **DECLARATION OF ALEX C. TURAN IN SUPPORT OF ADMINISTRATIVE MOTION TO CONSIDER WHETHER CASES SHOULD BE RELATED**

By ECF (Electronic Case Filing): I e-filed the above-detailed document utilizing the United States District Court, Northern District of California's mandated ECF service on July 16, 2008. Counsel of record are required by the Court to be registered e-filers, and as such are automatically e-served with a copy of the document(s) upon confirmation of e-filing.

I declare under penalty of perjury that the foregoing is true and correct. Executed at San Francisco, CA on July 16, 2008

/S/ Alex C. Turan

EXHIBIT A

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MD

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

LYNN BARTON, on behalf of herself and all
others similarly situated,

Plaintiff,

v.

FIDELITY NATIONAL FINANCIAL, INC.,
FIDELITY NATIONAL TITLE INSURANCE
COMPANY, TICOR TITLE INSURANCE
COMPANY, TICOR TITLE INSURANCE
COMPANY OF FLORIDA, CHICAGO TITLE
INSURANCE COMPANY, NATIONAL TITLE
INSURANCE OF NEW YORK, INC.,
SECURITY UNION TITLE INSURANCE
COMPANY, THE FIRST AMERICAN
CORPORATION, FIRST AMERICAN TITLE
INSURANCE COMPANY, UNITED
GENERAL TITLE INSURANCE COMPANY,
LANDAMERICA FINANCIAL GROUP, INC.,
COMMONWEALTH LAND TITLE
INSURANCE COMPANY, LAWYERS TITLE
INSURANCE CORPORATION,
TRANSNATION TITLE INSURANCE
COMPANY, STEWART TITLE GUARANTY
COMPANY and STEWART TITLE
INSURANCE COMPANY

Defendants.

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CLASS ACTION COMPLAINT

JURY TRIAL DEMANDED

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CLASS ACTION COMPLAINT

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1 Plaintiff, Lynn Barton, by her attorneys, on behalf of herself and all others similarly
2 situated, brings this action for treble damages and injunctive relief under the antitrust laws of the
3 United States and based on statutes of the State of California against the above named defendants,
4 demand a trial by jury, and complaining and alleging as follows:

5 I. INTRODUCTION

6 1. From the consumer's point of view, title insurance differs greatly from other, more
7 familiar kinds of insurance. For one thing, while automobile and homeowner insurance policies
8 protect consumer from an event that may occur in the future, title insurance offers protection from
9 events that might have occurred in the past.

10 2. Most simply, title insurance is protection purchased against a loss arising from
11 problems that occurred in the past and may affect the title to the real estate that a consumer is
12 buying. Title insurers do not compete on the basis of the policies or coverage that they provide. In
13 fact, almost all title policies are based on a single set of form policies published and maintained by
14 the national trade association, the American Land Title Association. Furthermore, the end goal of
15 an exhaustive title search by a title insurer is not to provide coverage for title defects that the search
16 uncovers, but rather to exclude coverage for any such defects and therefore, further reduce the real
17 value of the title policy which is written to cover only unknown defects in title at the time of
18 issuance. As a result, title insurance is a commodity product.

19 3. Even for the savviest of insurance consumers, the purchase of a title insurance
20 policy is just one more expensive step in the dizzying, convoluted and often confusing flurry of
21 paperwork and signings that culminate in the closing of a home purchase. Consumers who
22 normally shop around for their insurance and carefully compare prices, typically emerge from the
23 closing on their new home holding an insurance policy that they know virtually nothing about and
24 that in all likelihood, they will never need.

25 4. The title insurance market in California consists of a dozen carriers, ranging in size
26 from regional companies to national affiliates. However, the market is dominated by four groups
27 of affiliated companies which, combined, sell over 90 percent of the title insurance policies sold in
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1 California and which own and control the title plants in many California counties that every title
2 insurer must rely on in order issue title policies.

3 5. Title companies, in marked contrast to property, casualty, life and other traditional
4 insurance carriers, choose not to market their products directly to the consumers who pay for them.
5 Instead, the title insurance industry operates on what is termed a "reverse competition" model.
6 Reverse competition means that title companies solicit business referrals from the other major
7 players in the home purchase scenario – real estate agents and agencies, banks, lenders, builders,
8 developers and others: middlemen or go-betweens. The title companies pay middlemen for these
9 referrals in the form of direct payments, advertising expenses, junkets, parties and other kick-backs
10 and inducements. In addition, middlemen such as Windermere, John L. Scott and Caldwell
11 Banker-Bain, who themselves control a significant portion of the real estate brokerage market, take
12 significant ownership stakes in local title agents and affiliates of the major title insurers and
13 thereby get a direct return in profit from the referral of title business to the title agent whom they
14 partly or wholly own.

15 6. Reverse competition, as the term suggests, isn't a model that benefits consumers
16 through market-driven forces. In fact, consumers are bypassed completely as title companies
17 spend nearly all of their marketing budgets "wining and dining" real estate agents, banks, lenders,
18 builders, developers and others in an effort to convince these middlemen to steer their home-
19 buying clients to their companies for their title insurance needs.

20 7. In some of the major markets in the United States, these same title insurers
21 collectively meet, and jointly set rates and file these rates with the applicable state insurance
22 authority. The rates are not subject to any meaningful review or regulation. The companies agree
23 to fix the price of title insurance far in excess of the risk and loss experience associated with such
24 insurance. As a result of the joint agreement as to rates, competition is relegated to the middleman.
25 As a result of their joint rate setting and agreement, no company competes on price to the
26 consumer.

27 8. Having agreed to fix prices in states where joint rate setting occurs, the companies
28 agreed to not compete based on price to the consumer in other states, including California, where

1 regulation of filed rates is lax or non-existent. Thus, they agreed to set rates at supra competitive
2 prices and to compete based on offering inducements to middlemen. In California, in three
3 successive reports, the Office of the Insurance Commissioner ("OIC") has found an "astonishing
4 number" of such inducements that are in violation of state law. However, the OIC does not
5 actively oversee or regulate rates, and, in fact, does not by its own admission have the power to do
6 so. The absence of regulation has allowed collusive behavior and excessive rates.

7 9. In addition to paying inducements and kick-backs, the title companies and their
8 agents divide the market of real-estate middlemen through the use of Affiliated Business
9 Arrangements ("ABAs"), wherein the dominant real estate brokers purchase significant ownership
10 stakes in favored title insurance affiliates. The real estate brokers then reward their associates for
11 using the preferred title insurance providers and lock-out independent title insurers.

12 10. In this action, plaintiff, on behalf of a Class of those purchasing title insurance in
13 California, seek damages arising from defendants' violations of the Sherman Act as well as
14 California statutory law.

15 II. JURISDICTION AND VENUE

16 11. This Complaint is filed and these proceedings are instituted under Sections 4 and 16
17 of the Act of Congress of October 15, 1914, C. 323, Stats. 731, 737 (15 U.S.C. §§ 15, 26) to obtain
18 injunctive relief and to recover treble damages and the costs of suit, including a reasonable
19 attorneys' fee, against defendants for the injuries sustained by plaintiff and the members of the
20 Class which she represents by reason of defendants' and their co-conspirators' violations, as
21 hereinafter alleged, of Section I of the Sherman Act (15 U.S.C. § 1).

22 12. Defendants transact business, maintain offices or are found within the Northern
23 District of California. The interstate commerce described hereinafter is carried on, in part, within
24 the Northern District of California and the conspiratorial acts herein alleged were carried on, in
25 part, in the Northern District of California.

26 13. Intradistrict Assignment: Assignment to the San Francisco or Oakland division of
27 this Court is appropriate because a substantial part of the events or omissions which give rise to the
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1 claim occurred in the county of San Francisco. Pursuant to Northern District of California, Local
2 Rule 3-2(d), assignment to either the San Francisco Division or the Oakland Division is proper.

3 III. PARTIES

4 A. Plaintiff

5 14. Plaintiff, Lynn Barton, is an individual residing in San Francisco County,
6 California. During the Class Period, plaintiff purchased title insurance directly from one or more
7 of the defendants herein and has been injured by reason of the antitrust violations alleged.

8 B. Defendants

9 15. Defendant Fidelity National Financial, Inc. ("Fidelity National") is a Delaware
10 corporation headquartered at 601 Riverside Avenue, Jacksonville, Florida 32204. Fidelity National
11 does business in California through one or more of its subsidiaries, including but not limited to,
12 defendants Fidelity National Title Insurance Company, Ticor Title Insurance Company, Ticor Title
13 Insurance Company of Florida, National Title Insurance of New York, Inc., Security Union Title
14 Insurance Company, and Chicago Title Insurance Company. Fidelity National is registered to do
15 business in California.

16 16. Defendant Fidelity National Title Insurance Company ("FNTIC") is a California
17 Corporation with its principle place of business at 601 Riverside Ave., Jacksonville, Florida 32204.
18 FNTIC does business in California, is a licensed title insurance company in California and is
19 registered to do business in California.

20 17. Defendant Ticor Title Insurance Company ("Ticor") is a California Corporation
21 with its principle place of business at 601 Riverside Ave., Jacksonville, Florida 32204. Ticor does
22 business in California, is a licensed title insurance company in California and is registered to do
23 business in California.

24 18. Defendant Ticor Title Insurance Company of Florida ("TTICF") is a Florida
25 corporation with its principle place of business at 601 Riverside Ave., Jacksonville, Florida 32204.
26 TTICF does business in California, is a licensed title insurance company in California and is
27 registered to do business in California.

1 19. Defendant Chicago Title Insurance Company ("Chicago Title") is a Missouri
2 Corporation with its principle place of business at 601 Riverside Ave., Jacksonville, Florida 32204.
3 Chicago Title does business in California, is a licensed title insurance company in California and is
4 registered to do business in California.

5 20. Defendant National Title Insurance of New York, Inc. ("NTINY") is a New York
6 corporation with its principle place of business at 601 Riverside Ave., Jacksonville, Florida 32204.
7 NTINY does business in California, is a licensed title insurance company in California and is
8 registered to do business in California.

9 21. Defendant Security Union Title Insurance Company ("SUTIC") is a California
10 corporation with its principle place of business at 601 Riverside Ave., Jacksonville, Florida 32204.
11 SUTIC does business in California, is a licensed title insurance company in California and is
12 registered to do business in California.

13 22. The Fidelity family of title insurance companies (collectively, "Fidelity") – which
14 includes defendants Fidelity National, FNTIC, Ticor, TTICF, Chicago Title, NTINY and SUTIC,
15 and their affiliates – is engaged in selling title insurance to purchasers of commercial and
16 residential real estate throughout the United States, including California. Nationally, Fidelity
17 accounts for approximately 27 percent of title premiums, which in 2006 amounted to roughly
18 \$4.6 billion. Fidelity, Chicago Title and Ticor were founding members of TIRSA (defined below)
19 and since TIRSA's inception have charged title insurance rates in New York that TIRSA
20 collectively sets.

21 23. The Fidelity family of title insurance companies and their affiliates are wholly-
22 owned and controlled by defendant Fidelity National Financial, Inc. Through its subsidiaries,
23 Fidelity National is a provider of title insurance, specialty insurance, and claims management
24 services. Fidelity National had 2006 revenues of roughly \$9.4 billion. The Fidelity family of title
25 insurance companies engaged in the conduct challenged herein with the approval and assent of
26 defendant Fidelity National.

1 24. Defendant The First American Corporation ("First American") is a California
2 corporation with its headquarters at 1st American Way, Santa Ana, California 92707. First
3 American does business in California through one or more of its subsidiaries, including but not
4 limited to, defendants First American Title Insurance Company and United General Title Insurance
5 Company.
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7 25. Defendant First American Title Insurance Company ("FATIC") is a California
8 corporation with its headquarters at 1st American Way, Santa Ana, California 92707. FATIC does
9 business in California, is a licensed title insurance company in California and is registered to do
10 business in California.

11 26. Defendant United General Title Insurance Company ("UGTIC") is a Colorado
12 corporation located at 8310 S. Valley Highway, Suite 130, Englewood, CO 80112. UGTIC does
13 business in California, is a licensed title insurance company in California and is registered to do
14 business in California.

15 27. The First American family of title insurance companies (collectively, "First
16 American") – which includes defendants First American, FATIC and UGTIC, and their affiliates –
17 is engaged in selling title insurance to purchasers of commercial and residential real estate
18 throughout the United States, including California. Nationally, First American accounts for
19 approximately 29 percent of title premiums, which in 2006 amounted to roughly \$4.8 billion. First
20 American Title was a founding member of TIRSA and since TIRSA's inception has charged title
21 insurance rates in New York that TIRSA collectively sets.
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23 28. The First American family of title insurance companies and their affiliates are
24 wholly-owned and controlled by defendant The First American Corporation. Through its
25 subsidiaries, First American is a provider of title insurance, business information, and related
26 products and services. First American had 2006 revenues of roughly \$8.5 billion. The First
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1 American family of title insurance companies and their affiliates engaged in the conduct
2 challenged herein with the approval and assent of defendant First American.

3 29. Defendant LandAmerica Financial Group, Inc. ("LandAmerica") is a Virginia
4 corporation headquartered at 5600 Cox Road, Glen Allen, Virginia 23060. LandAmerica does
5 business in California through one or more of its subsidiaries, including but not limited to,
6 defendants Commonwealth Land Title Insurance Company, Lawyers Title Insurance Corporation
7 and Transnation Title Insurance Company.

8 30. Defendant Commonwealth Land Title Insurance Company ("CLTIC") is a
9 Pennsylvania corporation with is principle place of business at 5600 Cox Road, Glen Allen,
10 Virginia 23060. CLTIC does business in California, is a licensed title insurance company in
11 California and is registered to do business in California.

12 31. Defendant Lawyers Title Insurance Corporation ("LTIC") is a Nebraska corporation
13 with is principle place of business at 5600 Cox Road, Glen Allen, Virginia 23060. LTIC does
14 business in California, is a licensed title insurance company in California and is registered to do
15 business in California.

16 32. Defendant Transnation Title Insurance Company ("TNTIC") is a Nebraska
17 corporation with is principle place of business at 5600 Cox Road, Glen Allen, Virginia 23060.
18 TNTIC does business in California, is a licensed title insurance company in California and is
19 registered to do business in California.

20 33. The LandAmerica family of title insurance companies (collectively,
21 "LandAmerica") – which includes defendants LandAmerica, CLTIC, LTIC and TNTIC, and their
22 affiliates – is engaged in selling title insurance to purchasers of commercial and residential real
23 estate throughout the United States, including California. Nationally, LandAmerica accounts for
24 approximately 19 percent of title premiums, which in 2006 amounted to roughly \$3.15 billion.
25 Commonwealth and Lawyers Title were founding members of TIRSA and since TIRSA's
26 inception have charged title insurance rates in New York that TIRSA collectively sets.

27 34. The LandAmerica family of title insurance companies and their affiliates are
28 wholly-owned and controlled by defendant Land America Financial Group, Inc. Through its

1 subsidiaries, LandAmerica is a provider of title insurance and other products and services that
2 facilitate the purchase, sale, transfer, and financing of residential and commercial real estate.
3 LandAmerica had 2006 revenues of roughly \$4 billion. The LandAmerica family of title insurance
4 companies and their affiliates engaged in the conduct challenged herein with the approval of
5 defendant LandAmerica.

6 35. Defendant Stewart Title Guaranty Company ("STGC") is a Texas corporation
7 headquartered at 1980 Post Oak Blvd., Suite 800, Houston, Texas 77056. STGC does business in
8 California, is a licensed title insurance company in California and is registered to do business in
9 California.

10 36. Defendant Stewart Title Insurance Company ("STIC") is a New York corporation
11 with its principle place of business at 300 E. 42nd St., Floor 10, New York, NY 10017. STIC does
12 business in California, is a licensed title insurance company in California and is registered to do
13 business in California.

14 37. The Stewart family of title insurance companies (collectively, "Stewart") – which
15 includes defendants STGC and STIC, and its affiliates – is engaged in selling title insurance to
16 purchasers of commercial and residential real estate throughout the United States and California.
17 Nationally, Stewart accounts for approximately 12 percent of title premiums, which in 2006
18 amounted to roughly \$2 billion. Stewart was a founding member of TIRSA and since TIRSA's
19 inception has charged title insurance rates in New York that TIRSA collectively sets.

20 38. Together, defendants account for more than 85 percent of the title premiums
21 consumers pay in California. Nationally, they account for more than 85 percent of title premiums,
22 which in 2006 amounted to roughly \$14.5 billion. Throughout the relevant damages period,
23 defendants charged California consumers in California virtually identical title insurance rates.

24 IV. OTHER ENTITIES

25 39. TIRSA is a voluntary association of title insurers licensed as a rate service
26 organization pursuant to Article 23 of the State of New York Insurance Law. TIRSA maintains its
27 offices in New York City, which until recently were located at the same New York address of
28 Fidelity Title.

1 40. TIRSA annually compiles from its members statistical data relating to their title
2 insurance premiums, losses and expenses and submits this information in aggregate form to the
3 New York Insurance Department. TIRSA also prepares and submits the New York Title Insurance
4 Rate Manual which sets forth title rates to be charged and rules to be followed by TIRSA's
5 members. The Insurance Department has never objected to any of the rates TIRSA has collectively
6 set. Similarly, the California OIC has not actually held a public hearing or conducted any other
7 review or regulation of the title insurance rates in California for thirty years.

8 41. TIRSA's membership is comprised of defendant insurers and all other title insurers
9 that are licensed to issue policies in New York. Currently, Fidelity, First American, LandAmerica,
10 and Stewart collectively represent 14 of TIRSA's 22 members. As such, they comprise a majority
11 voting block which, according to TIRSA's by-laws, allows them to control the operations of
12 TIRSA and, in particular, TIRSA's collective rate setting activity.

13 42. Various other persons, firms and corporations not made defendants herein have
14 participated as co-conspirators with the defendants in the violations alleged herein and have
15 performed acts and made statements in furtherance thereof.

16 V. CLASS ACTION ALLEGATIONS

17 43. Plaintiff brings this action under Rule 23, and particularly subsection (b)(3), of the
18 Federal Rules of Civil Procedure, on behalf of herself and a Class consisting of all persons
19 excluding governmental entities, defendants, subsidiaries and affiliates of defendants, who
20 purchased directly, from one or more of the defendants and/or their co-conspirators title insurance
21 for residential and commercial property in California during the four year period preceding this
22 lawsuit and who have sustained damages as a result of the conspiracy herein alleged. The number
23 of potential Class members is so numerous that joinder is impracticable.

24 44. Plaintiff, as representative of the Class, will fairly and adequately protect the interest
25 of the Class members. The interests of plaintiff are coincident with, and not antagonistic to, those
26 of the Class members.

27 45. Except as to the amount of damages each member of the Class has by itself
28 sustained, all other questions of fact and law are common to the Class, including but not limited to,

1 the combination and conspiracy hereinafter alleged, the violation of Section 1 of the Sherman Act
2 (15 U.S.C. § 1) and the effects of such violation.

3 46. Plaintiff, along with all other members of the Rule (b)(3) Class, were injured as a
4 result of paying supracompetitive prices for title insurance in California. These supracompetitive
5 prices were achieved as a result of defendants' illegal price-fixing activities and market allocation
6 and division.

7 47. Members of the Class include hundreds of thousands, if not millions, of consumers.
8 They are so numerous that their joinder would be impracticable.

9 48. Plaintiff also brings this action as a class action under Rule 23(b)(2) of the Federal
10 Rules of Civil Procedure, for violations of Section 1 of the Sherman Act, 15 U.S.C. § 1. The Rule
11 (b)(2) Class includes all members of the (b)(3) Class, and all consumers who are threatened with
12 injury by the anticompetitive conduct detailed herein.

13 49. Defendants have acted, continued to act, refused to act and continued to refuse to act
14 on grounds generally applicable to the Rule (b)(2) Class, thereby making appropriate final
15 injunctive relief with respect to the Rule (b)(2) Class as a whole.

16 50. Members of the Rule (b)(2) Class include hundreds of thousands, if not millions, of
17 consumers. They are so numerous that their joinder would be impracticable.

18 51. Common questions of law and fact exist with respect to all Class members and
19 predominate over any questions solely affecting individual Class members. Among the questions
20 of law or fact common to the class are the following:

- 21 • Whether defendants have engaged in the alleged illegal price-fixing activity
22 and market allocation and division.
- 23 • The duration and scope of defendants' alleged illegal price-fixing and market
24 allocation and division activity.
- 25 • Whether defendants' alleged illegal price-fixing and market allocation and
26 division has caused higher prices to plaintiffs and other purchasers of title
27 insurance in California.
- 28 • Whether the Insurance Commissioner has actively supervised defendants'
price fixing and market allocation and division.

54. There will be no extraordinary difficulty in the management of the Class action.

1 about \$1,010 (for a \$250,000.00) property to \$1,490 (for a \$500,000 property). For more
2 expensive homes and commercial properties, these prices are significantly higher. This amount
3 spent on title insurance has risen dramatically over the past decade.

4 61. Title insurance serves an important purpose. It protects the purchaser of a property
5 from any unidentified defects in the title that would in any way interfere with the full and complete
6 ownership and use of the property with the ultimate right to resell the property. Title insurance is
7 required by lenders in most residential and commercial real estate transactions.

8 62. Consumers exercise little discretion in choosing the title insurer from which they
9 purchase the insurance. That decision is typically made for them by their lawyer, mortgage broker,
10 lender, or realtor. Consequently, for most purchasers, the cost of title insurance is not challenged.
11 Most consumers do not even become aware of the price they will pay and to which insurer they
12 will pay it until the actual closing of the real estate transaction. By then it's too late, consumers
13 can't attempt to negotiate a better title insurance price or alternate provider for fear of delaying or
14 derailing the entire transaction. There is no shopping around. There is no negotiation of price.

15 63. This dynamic basically removes the sale of title insurance from the normal
16 competitive process. Unlike the regular forces of supply and demand that keep most industries and
17 their pricing in check, the title insurance industry is not subject to any real competitive constraints.
18 The purchasers of the insurance, in most instances, are not the ones making the purchasing
19 decisions. And, they are certainly in no position to question the price.

20 64. The most effective but illegal way for a particular title insurer to get business is to
21 encourage those making the purchasing decisions – the real-estate middlemen – to steer business to
22 that insurer. The best way to so motivate the middlemen is not through lower prices (that they are
23 not even paying). Rather, it is through kickbacks in the form of finder's fees, gifts, meals, business
24 services and other financial enticements. Therefore, it is through higher pricing (which allows for
25 generous inducements and kick-backs), not lower pricing, that provides the best way for title
26 insurers to compete and increase their business.

1 **B. Price-Fixing in the Large Markets**

2 65. New York is one of several states in which the leading title insurers collectively fix
3 their prices through a rate-setting organization like TIRSA. There are two principal cost
4 components that go into TIRSA's calculation. One comprises the risk associated with issuing the
5 title policy. The other comprises the "agency commissions" paid to title agents.

6 66. The risk component covers the risk the title insurer bears for any undiscovered
7 defects in the title. Unlike property insurance, title insurance carries with it a very limited risk of
8 loss to the insurer. That is because title insurance protects against unknown *prior* events that cause
9 defects in title. With a proper search and examination of prior ownership records, any such defects
10 can and almost always are readily identified and excluded from the policy's coverage.
11 Consequently, the average claim payout on a title insurance policy in the United States amounts to
12 only about 5 percent of the total premium collected. This is very different from property coverage
13 (such as auto and home insurance) – which protects against *future* occurrences over which the
14 insurer has little to no control – where the average claim payout amounts to about 80 percent of the
15 total premium.

16 67. The "agency commissions" component of the title insurance rate covers payments
17 made to title agents. Defendants have an ownership or management stake in many of the title
18 agencies to which these payments are made. A small portion of these payments is for the search
19 and exam of prior ownership records of the property being purchased to identify any liens,
20 encumbrances, burdens, exclusions, or other defects in the title. The search and exam function
21 does not involve the spreading or underwriting of risk, and title insurers typically outsource this
22 task to title agents.

23 68. The remainder, and by far the bulk, of the agency commissions are comprised of
24 costs unrelated to the issuance of title insurance. These costs include kickbacks and other financial
25 inducements title insurers provide to title agents and indirectly (through title agents) to the lawyers,
26 brokers, and lenders who, in reality, are the ones deciding which title insurer to use. These
27 payments have nothing to do with the issuance of title insurance and are made by title insurers
28 merely to inflate their revenues and steer business their way.

1 69. Under TIRSA's collective rate setting regime, roughly 85 percent of the total title
2 insurance premium is based on the so-called "costs" associated with the payment of agency
3 commissions. Only 15 percent is based on costs associated with the risk of loss.

4 70. TIRSA publishes its final calculated title rates in the New York Title Insurance Rate
5 Manual. These rates are tied to the value of the property being insured. This is so despite the fact
6 that the costs associated with agency commissions are entirely unrelated to the value of the
7 property. Indeed, agency kickbacks and enticements have little to do with producing a particular
8 title policy and provide no value – proportional to property value or otherwise – to the consumer.
9 Even search and exam costs are unrelated to property value. They instead depend on the age of the
10 property, the complexity of the ownership history, and the accessibility of prior ownership records.

11 71. There are other states in which the defendants overly meet and agree to fix the rates
12 for title insurance as part of a formal collective rate setting process.

13 **C. TIRSA's Formation**

14 72. Prior to TIRSA, the New York Board of Title Underwriters ("NYBTU") served as
15 the title insurance rate-setting body in New York. NYBTU, along with the title insurance rate
16 setting bureaus in many other states, was disbanded in the mid-1980s in the wake of a Federal
17 Trade Commission ("FTC") challenge to the collective rate setting activity of many of these
18 associations. The FTC's challenge culminated in *FTC v. Ticor Title Ins. Co.*, 504 U.S. 621 (1992),
19 where the Supreme Court held that to avoid *per se* illegal price fixing liability, the rate setting
20 activity of these rating bureaus must be actively supervised by the state.

21 73. In *Ticor*, the FTC focused its challenge on agency commissions. The FTC
22 contended that the respective state insurance departments merely rubber-stamped this portion of the
23 collectively fixed rates without any independent review or analysis of their reasonableness or cost
24 justification. The Supreme Court agreed with the FTC that this kind of limited state oversight was
25 not sufficient. Rather, to avoid illegal price-fixing liability, the state insurance department has to
26 "exercise[] sufficient independent judgment and control so that the details of the rates or prices have
27 been established as a product of deliberate state intervention, not simply by agreement among
28 private parties." *Ticor*, 504 U.S. at 634-35.

1 74. Following the Supreme Court's instruction in *Ticor*, the Third Circuit on remand in
2 *Ticor Title Ins. Co. v. FTC*, 998 F.2d 1129 (3d Cir. 1992), upheld the FTC's finding that the
3 collective rate-setting of certain state rating bureaus was improper because it was not actively
4 supervised by the state. According to the circuit court, "[t]he Supreme Court plainly instructed us
5 that a state's rubber stamp is not enough. Active supervision requires the state regulatory
6 authorities' independent review and approval." *Id.* at 1139.

7 75. Defendants formulated TIRSA's first rate manual and procedure soon after the
8 Supreme Court's *Ticor* decision. Through TIRSA, defendants have set up a rate-setting scheme to
9 get around the rigors of state oversight required by *Ticor*. They have done so by calculating a
10 single rate that comprises both risk and agency commission costs and by outsourcing to title agents
11 the agency commission costs. In this way, defendants avoid providing the Insurance Department
12 with any detailed breakout or backup for the bulk of the costs that make up their collectively fixed
13 rates.

14 76. TIRSA merely submits an aggregated figure that is supposed to represent the total
15 agency commission costs. Embedded within this figure is the vast quantity of dollars that are
16 funneled to and through the title agencies as kickbacks, financial inducements and other costs
17 unrelated to the issuance of title insurance. Defendants' design in all of this has been to effective
18 "hide" the cost basis for their artificially high and collectively fixed title insurance premiums from
19 the regulatory scrutiny that *Ticor* demands.

20 **D. Lack of Regulatory Supervision and Authority in New York and Other States**
21 **Including California**

22 77. There is no provision under the New York Insurance Law for TIRSA to include in
23 its collectively fixed rates kickbacks and other agency commission payments unrelated to the
24 issuance of title insurance. Indeed, the New York Insurance Department has openly acknowledged
25 that it lacks the authority to review any agency commission payments. It has likewise recognized
26 that defendants' outsourcing of agency commission costs has prevented it from performing a
27 meaningful review of TIRSA's calculated rates. This was made clear at a November 2006 public
28 hearing the New York Insurance Department held – the first in 15 years – where it questioned

1 TIRSA and its members on TIRSA's failure to provide the Insurance Department with any backup
2 or detail for agency commissions.

3 78. At the hearing, the Insurance Department conceded that it could not properly
4 evaluate TIRSA's calculated rates, and that it could only do so if it obtained the detailed cost
5 information on agency commissions that TIRSA does not provide.

6 79. The Insurance Department's recognition that it is not properly supervising TIRSA's
7 rate-setting activity is consistent with the April 2007 findings of the U.S. Government
8 Accountability Office ("GAO") that the title insurance industry is in need of greater state
9 regulation. The GAO studied the industry conditions of several states, including New York, and
10 concluded that "state regulators have not collected the type of data, *primarily on title agents' costs*
11 *and operations*, needed to analyze premium prices and underlying costs." (Emphasis added.)

12 80. Unchecked by regulatory review and insulated from competition, defendants have
13 thus been able to collectively fix title insurance rates at supra competitive levels and earn profits
14 that vastly exceed those contemplated by the Insurance Department or that would have resulted in a
15 free and open competitive market.

16 81. At the time of TIRSA's formation, the Insurance Department established 5 percent
17 (of the total premium) as the level of profit to which title insurers are entitled. The Insurance
18 Department is supposed to carefully analyze TIRSA's rate calculations, and, in particular, its
19 revenue and cost information, to ensure that this 5 percent profit level is maintained and based on a
20 reasonable premium. However, without the authority or ability to scrutinize agency commission
21 costs, the Insurance Department has been unable to perform this function. As a result, defendants
22 (through TIRSA) have been able to set artificially high title premiums and secure title profits far in
23 excess of the 5 percent threshold.

24 82. Through an independent investigation conducted over the past several years, the
25 New York State Attorney General found that for every dollar of insurance premium defendants
26 collected, of the roughly 15 cents that supposedly accounts for the risk of loss, only 3 cents is paid
27 out in claims. And, of the roughly 85 cents that supposedly covers agency commissions, only
28 between 8 and 11 cents goes to costs actually incurred by title agents in producing the title policy.

1 These numbers show that title insurers' collectively fixed rates have resulted in profits that
2 untethered to and vastly exceed the costs of producing such policies.

3 83. The New York Attorney General's investigation further revealed that what was
4 largely driving these numbers were the kickbacks and other financial inducements defendants were
5 funneling to and through title agents to secure more business. As reported at the New York
6 Insurance Department's 2006 hearing, one title agency's financial statements revealed that it spent
7 more than \$1 million of these so-called "agency commissions" on items identified as "Christmas",
8 "automobile expenses", "political contributions", "promotional expenses", and "travel and
9 entertainment". These expenses are not even remotely related to the issuance of title insurance.

10 84. The Washington State Insurance Commissioner's October 2006 report found
11 strikingly similarly abuses in Washington. Violations were pervasive and the Commissioner
12 concluded that consumers were paying too much as a result.

13 85. All of this "excess money" paid to title agents not only works to steer business to
14 defendants. It also serves to boost defendants' own profits through the inflated revenues they
15 obtain to cover these agency payments and through their ownership or management stake in many
16 of these agencies.

17 86. Defendants are competitors in the sale of title insurance to consumers throughout
18 the United States. These title insurers have agreed and engaged in concerted efforts to
19 (i) collectively set and charge uniform and supracompetitive rates for title insurance, (ii) include in
20 their calculated rates agency commission costs, (iii) embed within these costs payoffs, kickbacks,
21 and other charges that are unrelated to the issuance of title insurance, and (iv) hide these supposed
22 "costs" from regulatory scrutiny by funneling them to and through title agents over which the
23 government agencies have no ability or authority to regulate.

24 87. The GAO in its 2007 report entitled "Actions Needed to Improve Oversight of the
25 Title Insurance Industry and Better Protect Consumers" found several indicia of a lack of
26 competition and questions about the reasonableness of prices including:
27
28

- Consumers find it difficult to shop for title insurance, therefore, they put little pressure on insurers and agents to compete based on price;
 - Title agents do not market to consumers, who pay for title insurance, but to those in the position to refer consumers to particular title agents, thus creating potential conflicts of interest;
 - A number of recent investigations by HUD and state regulatory officials have identified instances of alleged illegal activities with the title industry that appear to reduce price competition and could indicate excessive prices;
 - As property values or loan amounts increase, prices paid for title insurance by consumers appear to increase faster than insurers' and agents' costs; and
 - In states where agents' search and examination services are not included in the premium paid by consumers, it is not clear that additional amounts paid to title agents are fully supported by underlying costs.
88. The GAO visited several states, including California, and found a lack of regulatory

oversight:

In the states we visited, we found that regulators did not assess title agents' costs to determine whether they were in line with premium rates; had made only limited efforts to oversee title agents (including ABAs involving insurers and agents); and, until recently, had taken few actions against alleged violations of antikickback laws. In part, this situation has resulted from a lack of resources and limited coordination among different regulators within states. On the federal level, authority for alleged violations of section 8 of RESPA, including those involving increasingly complex ABAs, is limited to seeking injunctive relief. Some state regulators expressed frustration with HUD's level of responsiveness to their requests for help with enforcement, and some industry officials said that RESPA rules regarding ABAs and referral fees need to be clarified. Industry and government stakeholders have proposed several regulatory changes, including RESPA reform, strengthened regulation of agents, a competitor right of action with no monetary penalty, and alternative title insurance models. [*Id.* at 41, footnotes omitted.]

E. Competition Based on Kickbacks and Inducements But Not Rates

89. Having agreed to fix or stabilize prices in New York and other states where they overtly meet to promulgate rates, these same defendants then set out to do the same in other states.

90. In other words, as a direct result of these meetings where rates were agreed to, these same defendants agreed, either expressly or tacitly, to not compete on rates in other states as well. To compete on rates in other states could and would imperil their ability to maintain the agreed rate in states like New York.

91. As is the case in New York, a lack of regulatory authority over rates created an environment in which a conspiracy can and did succeed. No agency was examining why all the rates were virtually identical, and no agency was examining whether the costs associated with these premiums were reasonable. This is an environment which is conducive to price fixing.

92. In California, there is a lack of regulatory authority and oversight over title insurance companies. The rates in California are not set as part of a deliberate state intervention and the state does not and cannot meaningfully renew or approve these rates. The rates at issue in this case went into effect without review.

F. Other Indicators of a Lack of Competition and Conditions Conducive to Collusive Rate Setting

93. In addition to the uniformity of rates, other facts suggest that it is more plausible than not that rates have been set based on an agreement to fix prices.

94. In theory, the chain of title should be documented back to its historic grant of ownership centuries in the past. Fear about a possible title defect in the distant past is widely used as a justification by title agencies when convincing property buyers to purchase an owner policy in addition to the lender policy, which is mandatory to secure a mortgage. The title agency, however, saves much time and money when the search is limited to one or two transactions. They rely on the insurance policy to cover the remote chance of missing an earlier but still-valid claim. If such a claim is asserted and survives the scrutiny of the title insurance company's legal department, the expected cost of compensation is likely to be less than the sum of added overhead costs of routinely tracing back every chain of title to the earliest registered owner in the distant past.

1 95. Title insurance industry officials tend to justify the large proportion of the premium
2 retained by the title abstract and settlement agency (from 60 to more than 90 percent) by the
3 alleged high cost of title searching back into the distant past. In fact, a high proportion of
4 noncommercial properties are searched only through the most recent transaction. No information
5 is available as to what proportion of claims originate in the distant past. The industry has never
6 published pertinent statistics. It would have a marketing incentive to publish these statistics if the
7 risk were significant; that it has not published these statistics indicates that the risk probably is only
8 slightly greater than zero.

9 96. Many U.S. homes are being resold three or four times in twenty-five years. At each
10 of these occasions, an abstract of title will be prepared on the basis of a more or less thorough
11 review of the available title records, inheritance records, family records and records of past or
12 current liens against a property. It is reasonable, therefore, to suspect that the risk of a title defect
13 will decrease every time a property is sold.

14 97. Title searches have become less labor intensive, especially in large urban counties
15 and cities. More and more of the information is available online. The statistical likelihood that a
16 title default would be overlooked is a closely held industry secret, but it appears to be so small that
17 many transactions are now insured on the basis of a search of the last owner's title history or a
18 search into transactions that occurred during the last twenty-five to thirty-five years. The evidence
19 is strong that the title insurance industry has achieved a remarkably high level of loss minimization.

20 98. Thus the costs of production have decreased as has the risk of loss yet none of these
21 factors has resulted in price competition at the consumer level.

22 99. There is a remarkable absence of rate changes by title insurers over the past five
23 years, despite declining costs of production, increased number of transactions and increased
24 revenue per transaction. During a period when costs per unit of production declined significantly,
25 underwritten title companies and title insurers maintained excessive rates. The prices charged by
26 title insurers and underwritten title companies were not and are not responsive to the changing
27 costs of production or increasing revenue per transaction at a given set of rates. Again, this is
28 indicia of an agreement not to compete based on price.

1 100. As noted, the title companies engage in illegal rebates and kickbacks where the title
2 insurer or the underwritten title company provides money, free services or other things of value to
3 a real estate agent, a lender or homebuilder in exchange for business referrals. These illegal rebates
4 and kickbacks – a consequence of reverse competition – show that title insurance rates are supra
5 competitive and that some portion of the overcharge is passed from the underwritten title company
6 or title insurer to the referrer of business.

7 101. A lack of competition and the ability to control prices is enhanced by the fact that
8 there were few title insurer entrants over the period from 1995 through 2005 and the number of
9 title insurer groups declined as title insurers acquired other title insurers. There were few
10 underwritten title company entrants over the 2000 to 2005 period and new entrants were controlled
11 business arrangements whose addition to the market did not result in greater price competition.

12 102. Access to title plants can be a barrier to entry, but a large barrier to entry exists due
13 to the established relationships between the entities that can steer the consumer's title and escrow
14 business and the entities who sell title insurance and escrow services.

15 103. The title insurance market is highly concentrated – a few title insurers account for
16 the vast majority of title insurance sales – at both the statewide level and at the county level in
17 California. For example, three title insurer groups account for 77.4% of the market at a statewide
18 level. At the county level, each individual market was highly concentrated. The GAO found that
19 First American and Fidelity had a market share of 66 percent. Such a concentration enhances the
20 ability of companies to fix prices

21 104. The agreement not to compete based on price is also evidenced by the fact that no
22 company has marketed its services to consumers, the ultimate purchasers of the product. This is in
23 marked contrast to real insurance, for example, car insurance, where the companies compete
24 vigorously with well recognized slogans such as State Farm's "Like a Good Neighbor," or
25 Allstate's "good hands," or the cute (to some) GEICO gecko promising low prices.

VIII. CLAIMS FOR RELIEF

COUNT I

Violation of the Sherman Act

105. Plaintiff incorporates by reference the preceding allegations.

106. Beginning at least as early as February 2004, and continuing thereafter to the present, the exact dates being unknown to plaintiff, defendants and their co-conspirators engaged in a combination and conspiracy in unreasonable restraint of the aforesaid interstate trade and commerce in violation of Section 1 of the Sherman Act.

107. The aforesaid combination and conspiracy has consisted of a continuing agreement, understanding and concert of action among the defendants and their co-conspirators, the substantial terms of which have been:

(a) to fix, raise, maintain and stabilize the price of title insurance throughout California;

(b) to fix, raise, maintain and stabilize the terms and conditions of sale of title insurance in California; and

(c) to allocate and divide the market for title insurance in California.

108. In the absence of proper regulatory authority and oversight, defendants' conduct constitutes a horizontal agreement to fix the form, structure, and prices of title insurance and to allocate and divide the title insurance market in California and is a *per se* violation of Section I of the Sherman Act.

109. Defendants' price-fixing, market allocation and division activity has been continuous throughout the relevant damages period and has been renewed and reinforced annually through submissions to the OIC of supposed cost and revenue information and its periodic submissions of rate changes.

110. Through their collective price-fixing, market allocation and division and manipulation of the regulatory process, defendants have harmed competition by charging consumers supra competitive prices for title insurance in California, evidenced in part by the fact that the prices are uniformly higher than compared with the cost of providing the insurance.

1 111. The aforesaid combination and conspiracy has had the following effects among
2 others:

3 (a) price competition in the sale of title insurance has been suppressed,
4 restrained and eliminated;

5 (b) prices for title insurance have been raised, fixed, maintained and stabilized at
6 artificially high and non-competitive levels; and

7 (c) purchasers of title insurance have been deprived of the benefit of free and
8 open competition.

9 112. During the period of the antitrust violations by defendants and their co-conspirators,
10 plaintiff and each member of the Class she represents, has purchased title insurance and, by reason
11 of the antitrust violations herein alleged, paid more for such that it would have paid in the absence
12 of said antitrust violations. As a result, plaintiff and each member of the Class she represents, has
13 been injured and damaged in an amount presently undetermined.

14 **COUNT II**

15 **Violation of Cal. Bus. and Prof. Code §§ 16720, *et seq.***

16 113. Plaintiff incorporates by reference the preceding allegations.

17 114. Defendants conduct as set forth above is in violation of the Cartwright Act of
18 California (Cal. Bus. & Prof. Code §§ 16720, *et seq.*).

19 115. As a direct result of defendants' unlawful acts plaintiffs have paid artificially
20 inflated prices for title insurance and have suffered injury to their business and property.

21 **COUNT III**

22 **(California's Business & Professions Code §§ 17200, *et seq.*)**

23 116. The preceding paragraphs of this Complaint are realleged and incorporated by
24 reference. Plaintiff asserts this claim for violations of California's UCL, Bus. & Prof. Code
25 §§ 17200, *et seq.*, on behalf of herself and the members of the Class.

26 117. Defendants' statements and representations constitute unfair, unlawful and
27 deceptive trade practices in violation of the UCL.
28

1 118. All of the wrongful conduct alleged herein occurs and continues to occur in the
2 conduct of defendants' business. Defendants' wrongful conduct is part of a pattern or generalized
3 course of conduct that is repeated in the State of California on hundreds, if not thousands, of
4 occasions daily.

5 119. Plaintiff has suffered injury in fact and has lost money or property as a result of
6 defendants' unfair, unlawful and/or deceptive practices by paying a higher price for title insurance
7 then she would or should have absent the conduct complained of.

8 120. Plaintiff requests that this Court enter such orders or judgment as may be necessary
9 to enjoin the defendants from continuing its unfair, unlawful, and/or deceptive practices, to restore
10 to any person in interest any money which may have been acquired by means of such unfair
11 competition and to disgorge any profits realized by defendants as a result of its unfair, unlawful
12 and/or deceptive practices, as provided in Cal. Bus. & Prof. Code § 17203 and Cal. Civ. Code
13 § 3345, and for such other relief as set forth in the Prayer for Relief.

14 **COUNT IV**

15 **UNJUST ENRICHMENT**

16 121. Plaintiff incorporates by reference the preceding allegations.

17 122. This Cause of Action is pled in the alternative to all claims and/or causes of action
18 at law.

19 123. Defendant has received a benefit from plaintiff and the Class members in the form
20 of the prices plaintiff and the Class members paid for defendants' title insurance.

21 124. Defendants are aware of their receipt of the above-described benefit.

22 125. Defendants received the above-described benefit to the detriment of plaintiff and
23 each of the other members of the Class.

24 126. Defendants continue to retain the above-described benefit to the detriment of
25 plaintiff and the Class members.

26 127. As a result of defendants' unjust enrichment, plaintiff and the Class members have
27 sustained damages in an amount to be determined at trial and seek full disgorgement and restitution
28

1 of defendants' enrichment, benefits, and ill-gotten gains acquired as a result of the unlawful or
2 wrongful conduct alleged above.

3 **PRAYER FOR RELIEF**

4 WHEREFORE, plaintiff demands:

5 A. That the alleged combination and conspiracy among the defendants and their
6 co-conspirators be adjudged and decreed to be an unreasonable restraint of trade in violation of
7 Section 1 of the Sherman Act;

8 B. That the Court declare that the premiums charged are excessive under state law and
9 order damages;

10 C. That judgment be entered against defendants, jointly and severally, and in favor of
11 plaintiff, and each member of the Class it represents, for threefold the damages determined to have
12 been sustained by plaintiff, and each member of the Class it represents, together with the cost of
13 suit, including a reasonable attorneys' fee;

14 D. Each of the defendants, successors, assignees, subsidiaries and transferees, and their
15 respective officers, directors, agents and employees, and all other persons acting or claiming to act
16 on behalf thereof or in concert therewith, be perpetually enjoined and restrained from, in any
17 manner, directly or indirectly, continuing, maintaining or renewing the aforesaid combination,
18 conspiracy, agreement, understanding or concert of action, adopting or following any practice,
19 plan, program, or design having a similar purpose or effect in restraining competition; and

20 E. Such other and further relief as may appear necessary and appropriate.

21 **JURY TRIAL DEMANDED**

22 Pursuant to Rule 38, F.R.C.P., plaintiff demands a trial by jury of the claims alleged herein.

23 DATED: March 10, 2008.

24 HAGENS BERMAN SOBOL SHAPIRO LLP

25
26 By 
27

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EXHIBIT B

ORIGINAL
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EMC

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

CV 08

3391

RUBEN ROMERO and SARAH YAHN, on behalf of
themselves and all others similarly situated,

Case No. _____

Plaintiffs,

CLASS ACTION COMPLAINT

vs.

DEMAND FOR JURY TRIAL

FIDELITY NATIONAL FINANCIAL, INC.,
FIDELITY NATIONAL TITLE INSURANCE
COMPANY, TICOR TITLE INSURANCE
COMPANY, TICOR TITLE INSURANCE
COMPANY OF FLORIDA, CHICAGO TITLE
INSURANCE COMPANY, NATIONAL TITLE
INSURANCE COMPANY OF NEW YORK, INC.,
SECURITY UNION TITLE INSURANCE
COMPANY, THE FIRST AMERICAN
CORPORATION, FIRST AMERICAN TITLE
INSURANCE COMPANY, UNITED GENERAL
TITLE INSURANCE COMPANY, LANDAMERICA
FINANCIAL GROUP, INC., COMMONWEALTH
LAND TITLE INSURANCE COMPANY,
LAWYERS TITLE INSURANCE CORPORATION,
TRANSNATION TITLE INSURANCE COMPANY,
STEWART TITLE GUARANTY COMPANY,
STEWART TITLE INSURANCE COMPANY, OLD
REPUBLIC NATIONAL TITLE INSURANCE
COMPANY, and OLD REPUBLIC
INTERNATIONAL CORPORATION,

Defendants.

CLASS ACTION COMPLAINT

1 Plaintiffs Ruben Romero and Sarah Yahn, on behalf of themselves and all others similarly
2 situated, allege as follows:

3 INTRODUCTION

4 1. Plaintiffs bring this antitrust action on behalf of all persons and entities who purchased
5 title insurance in the State of California directly from the named defendants or any co-conspirator as
6 identified in this Complaint.

7 2. Title insurance is one of the most costly items associated with a real estate purchase,
8 aside from the purchase price of the property. In 2005, the price of title insurance for residential
9 properties ranged from approximately \$1,010 (for a \$250,000 property) to \$1,490 (for a \$500,000).
10 Title insurance premiums for more expensive homes and commercial properties are significantly
11 higher.

12 3. Title insurance differs from other kinds of insurance in three respects. First, unlike
13 automobile, life, homeowners or other forms of insurance, which protect consumers from loss
14 resulting from an event that may occur in the future, title insurance offers protection from events that
15 occurred in the past that may affect the title to the property. Second, unlike other forms of insurance,
16 in which coverage may vary, most title insurance policies are based on a single set of form policies,
17 published by the American Land Title Association, and provide substantially the same protection.
18 Third, unlike other forms of insurance, title companies do not market their products directly to the
19 consumers who pay for them. Instead, title insurers rely on "reverse competition" to market and sell
20 their products. They pay commissions, kick-backs or referral fees, or provide other inducements to
21 real estate agents, banks, lenders, builders and others involved in real estate transactions to use their
22 insurance products as part of those transactions.

23 4. In California, the title insurance market is dominated by five companies and their
24 affiliates or subsidiaries: Fidelity National Financial, Inc., First American Corporation, LandAmerica
25 Financial Group, Inc., Stewart Title Guaranty Title Company, and Old Republic National Title
26 Insurance Company. Combined, these five affiliate groups sell about 92 percent of the title insurance
27 policies sold in California – or roughly \$2.85 billion of the \$3.1 billion in title insurance premiums
28 collected from California consumers in 2004.

1 5. In some of the major markets in the United States, such as New York, these same title
2 insurers collectively meet, jointly set rates, and file these rates with the applicable state insurance
3 authority. The rates are not subject to any meaningful review or regulation, however. Moreover, the
4 companies agree to fix the price of title insurance at levels that include commissions, kick-backs and
5 other inducements paid to middlemen to steer business referrals to these companies. These agreed-
6 upon rates far exceed the risk and loss experience associated with title insurance. As a result of their
7 joint rate setting agreement, no company competes on price to the consumer.

8 6. Having agreed to fix prices in states where joint rate setting occurs, the five groups of
9 affiliated companies agreed not to compete based on price to the consumer in other states, including
10 California, where regulation of filed rates is non-existent. The result of this arrangement in California
11 is that these companies have agreed to compete by offering inducements to middlemen for business
12 referrals and thereby have fixed the rates of title insurance premiums at supra competitive levels.

13 7. These agreements and activities by five affiliate groups of title insurers, combined with
14 their market dominance in the State, have enabled these companies to maintain the price of title
15 insurance in California at artificially high levels. California regulators have acknowledged the harm
16 these agreements and this anti-competitive conduct have caused consumers during the Class Period.

17 8. In 2005, for example, the California Office of the Insurance Commissioner found an
18 “astonishing number” of kickbacks and similar inducements by title insurers to middlemen in
19 violation of state law. A report to the California Insurance Commissioner prepared that same year by
20 Birny Birnbaum, a consulting economist, also found “numerous examples in California of illegal
21 rebates and kickbacks where the title insurer or the underwritten title company provides money, free
22 services or other things of value to a real estate agent, a lender or homebuilder in exchange for
23 business referrals.” (*An Analysis of Competition in the California Title Insurance and Escrow*
24 *Industry*, December 2005, p.3) Similar findings by California Insurance Commissioner, Steve
25 Poizner, led to a February 2007 statement in which the Commissioner declared that “reasonable price
26 competition does not exist for title and escrow services” in California. (*Insurance Commissioner*
27 *Steve Poizner Issues Statement Following Decision by OAL in New Regulations, California*
28 *Department of Insurance*, February 22, 2007.)

9. The California Insurance Commissioner does not actively oversee or regulate rates, however, and does not have the power to do so. The absence of regulation by the California Insurance Commissioner has allowed collusive behavior among the five affiliate groups that dominate the market, as described herein, resulting in excessive rates for title insurance premiums in California.

10. As a result of defendants' unlawful conduct, plaintiffs and members of the Class paid higher prices for title insurance than they would have paid in a competitive market.

JURISDICTION AND VENUE

11. Plaintiffs bring this action to obtain injunctive relief and to recover damages, including treble damages, costs of suit, and reasonable attorneys' fees arising from defendants' violations of Section 1 of the Sherman Act (15 U.S.C. § 1). Plaintiffs also bring this action under the California Cartwright Act (Business and Professions Code § 16720 *et seq.*), and the California Unfair Competition Law (Business and Professions Code § 17200 *et seq.*).

12. This Court has jurisdiction over this action pursuant to Sections 4 and 16 of the Clayton Act (15 U.S.C. §§ 15 and 26) and 28 U.S.C. §§ 1331, 1332(d) and 1337(a). This Court also has supplemental jurisdiction over the state law claims pursuant to 28 U.S.C. § 1367.

13. Venue is proper in this judicial district pursuant to Section 12 of the Clayton Act (15 U.S.C. § 22) and 28 U.S.C. § 1391(b), (c) and (d), because a substantial part of the events giving rise to the plaintiffs' claims occurred in this District, a substantial portion of the affected interstate trade and commerce was carried out in this District, and one or more defendants transact business, maintain offices or are found in this District.

PARTIES

Plaintiffs

14. Plaintiffs Ruben Romero and Sarah Yahn, a married couple, are individuals residing in California. During the Class Period, plaintiffs Romero and Yahn purchased title insurance in California directly from one or more of the defendants and have been injured by reason of the antitrust violations alleged.

1 **Defendants**

2 **A. Fidelity Family of Title Companies**

3 15. Defendant Fidelity National Financial, Inc. ("Fidelity National") is a Delaware
4 corporation headquartered at 601 Riverside Avenue, Jacksonville, Florida 32204. Fidelity National
5 does business in California through one or more of its subsidiaries, including defendants Fidelity
6 National Title Insurance Company, Ticor Title Insurance Company, Ticor Title Insurance Company of
7 Florida, National Title Insurance of New York, Inc., Security Union Title Insurance Company, and
8 Chicago Title insurance Company. Fidelity National is registered to do business in California.

9 16. Defendant Fidelity National Title insurance Company ("Fidelity Title") is a California
10 corporation with its principal place of business located at 601 Riverside Avenue, Jacksonville, Florida
11 32204. Fidelity Title does business in California, is a licensed title insurance company in California,
12 and is registered to do business in California.

13 17. Defendant Ticor Title Insurance Company ("Ticor") is a California corporation with its
14 principal place of business located at 601 Riverside Avenue, Jacksonville, Florida 32204. Ticor does
15 business in California, is a licensed title insurance company in California, and is registered to do
16 business in California.

17 18. Defendant Ticor Title Insurance Company of Florida ("Ticor Florida") is a Florida
18 corporation with its principal place of business located at 601 Riverside Avenue, Jacksonville, Florida
19 32204. Ticor Florida does business in California, is a licensed title insurance company in California,
20 and is registered to do business in California.

21 19. Defendant Chicago Title insurance Company ("Chicago Title") is a Missouri
22 corporation with its principal place of business located at 601 Riverside Avenue, Jacksonville, Florida
23 32204. Chicago Title does business in California, is a licensed title insurance company in California,
24 and is registered to do business in California.

25 20. Defendant National Title Insurance of New York, Inc. ("National Title") is a New
26 York corporation with its principal place of business located at 601 Riverside Avenue, Jacksonville,
27 Florida 32204. National Title does business in California, is a licensed title insurance company in
28 California, and is registered to do business in California.

1 21. Defendant Security Union Title Insurance Company ("Security Union") is a California
2 corporation with its principal place of business located at 601 Riverside Avenue, Jacksonville, Florida
3 32204. Security Union does business in California, is a licensed title insurance company in
4 California, and is registered to do business in California.

5 22. The Fidelity family of title insurance companies (collectively "Fidelity") including
6 Fidelity National, Fidelity Title, Ticor, Ticor Florida, Chicago Title, National Title, Security Union,
7 and their affiliates, sells title insurance to purchasers of commercial and residential real estate
8 throughout the United States, including California. Nationally, Fidelity accounts for approximately 27
9 percent of title premiums. These sales amounted to approximately \$4.6 billion in 2006. Fidelity,
10 Chicago Title, and Ticor also were founding members of the New York rate-setting organization
11 known as TIRSA (discussed below), and have collectively fixed title insurance rates in the State of
12 New York under that rate setting regime since TIRSA's inception in 1991.

13 23. Fidelity and its affiliates are wholly-owned and controlled by Fidelity National.
14 Through its subsidiaries, Fidelity National is a provider of title insurance, specialty insurance, and
15 claims management services. During 2006, Fidelity National had revenues of approximately \$9.4
16 billion. Fidelity engaged in the conduct challenged here with the approval of Fidelity National.

17 **B. The First American Family of Title Companies**

18 24. Defendant The First American Corporation ("First American Corp.") is a California
19 corporation with its headquarters located at 1st American Way, Santa Ana, California 92707. First
20 American does business in California through one or more of its subsidiaries, including First
21 American Title Insurance Company.

22 25. Defendant First American Title Insurance Company ("First American Title") is a
23 California corporation with its headquarters at First American Way, Santa Ana, California 92707.
24 First American Title does business in California, is a licensed title insurance company in California,
25 and is registered to do business in California.

26 26. Defendant United General Title Insurance Company ("United General") is a Colorado
27 corporation located at 8310 S. Valley Highway, Suite 130, Englewood, Colorado 80112. United
28

1 General does business in California, is a licensed title insurance company in California, and is
2 registered to do business in California.

3 27. The First American family of title insurance companies (collectively "First
4 American"), including defendants First American, First American Title, United General, and their
5 affiliates, sells title insurance to purchasers of commercial and residential real estate throughout the
6 United States, including California. Nationally, First American accounts for approximately 29 percent
7 of title premiums. These sales amounted to approximately \$4.8 billion in 2006.

8 28. The First American family of title insurance companies and their affiliates are wholly-
9 owned and controlled by First American Corp. Through its subsidiaries, First American is a provider
10 of title insurance, business information, and related products and services. During 2006, First
11 American had revenues of approximately \$8.5 billion. The First American family of title insurance
12 companies and their affiliates engaged in the conduct challenged here with the approval of First
13 American Corp.

14 **C. LandAmerica Family of Title Companies**

15 29. Defendant LandAmerica Financial Group, Inc. ("LandAmerica") is a Virginia
16 corporation headquartered at 5600 Cox Road, Glen Allen, Virginia 23060. LandAmerica does
17 business in California through one or more of its subsidiaries, including Commonwealth Land Title
18 Insurance Company, Lawyers Title Insurance Corporation, and Transnation Title insurance Company.

19 30. Defendant Commonwealth Land Title Insurance Company ("Commonwealth") is a
20 Pennsylvania corporation with its principal place of business located at 5600 Cox Road, Glen Allen,
21 Virginia 23060. Commonwealth does business in California, is a licensed title insurance company in
22 California, and is registered to do business in California.

23 31. Defendant Lawyers Title Insurance Corporation ("Lawyers Title") is a Nebraska
24 corporation with its principal place of business located at 5600 Cox Road, Glen Allen, Virginia 23060.
25 Lawyers Title does business in California, is a licensed title insurance company in California, and is
26 registered to do business in California.

27 32. Defendant Transnation Title Insurance Company ("Transnation") is a Nebraska
28 corporation with its principal place of business located at 5600 Cox Road, Glen Allen, Virginia 23060.

1 Transnation does business in California, is a licensed title insurance company in California, and is
2 registered to do business in California.

3 33. The LandAmerica family of title insurance companies (collectively "LandAmerica"),
4 including defendants LandAmerica, Commonwealth, Lawyers Title, Transnation, and their affiliates,
5 is engaged in selling title insurance to purchasers of commercial and residential real estate throughout
6 the United States, including California. Nationally, LandAmerica accounts for approximately 19
7 percent of title premiums. These sales amounted to approximately \$3.15 billion in 2006.

8 34. The LandAmerica family of title insurance companies and their affiliates are wholly-
9 owned and controlled by defendant LandAmerica Financial Group, Inc. Through its subsidiaries,
10 LandAmerica is a provider of title insurance and other products and services that facilitate the
11 purchase, sale, transfer, and financing of residential and commercial real estate. During 2006,
12 LandAmerica had revenues of approximately \$4 billion. The LandAmerica family of title insurance
13 companies and their affiliates engaged in the conduct challenged here with the approval of
14 LandAmerica.

15 **D. Stewart Family of Title Companies**

16 35. Defendant Stewart Title Guaranty Company ("Stewart Guaranty") is a Texas
17 corporation headquartered at 1980 Post Oak Blvd., Suite 800, Houston, Texas 77056. Stewart
18 Guaranty does business in California, is a licensed title insurance company in California, and is
19 registered to do business in California.

20 36. Defendant Stewart Title insurance Company ("Stewart Title") is a New York
21 corporation with its principal place of business located at 300 E. 42nd Street, Floor 10, New York,
22 New York 10017. Stewart Title does business in California, is a licensed title insurance company in
23 California, and is registered to do business in California.

24 37. The Stewart family of title insurance companies (collectively "Stewart"), including
25 defendants Stewart Guaranty, Stewart Title, and their affiliates, sells title insurance to purchasers of
26 commercial and residential real estate throughout the United States and California. Nationally,
27 Stewart accounts for approximately 12 percent of title premiums. These sales amount to
28 approximately \$2 billion in 2006.

E. Old Republic Family of Title Companies

38. Old Republic National Title Insurance Company ("Old Republic") is a Delaware corporation with its principle place of business located at 400 Second Avenue South, Minneapolis, Minnesota 55401. Old Republic sells title insurance to purchasers of commercial and residential real estate throughout the United States, including California, and is a licensed title insurance company in California and is registered to do business in California. Nationally, Old Republic accounts for approximately 6 percent of title premiums that, in 2006, amount to roughly \$1 billion.

39. Old Republic and its affiliates are wholly owned and/or controlled by defendant Old Republic International Corporation ("Old Republic International"), a Delaware corporation headquartered in Chicago, Illinois. Through its subsidiaries, Old Republic International is a provider of title insurance, general insurance, mortgage guaranty insurance, and life and health insurance. Old Republic international had 2006 revenues of approximately \$3.8 billion. Old Republic engaged in the conduct alleged here with the approval of Old Republic International.

40. Together, defendants account for more than 90 percent of the market for title insurance premiums consumers pay in California. Defendants account for more than 85 percent of the national market for title insurance premiums. In 2006, those sales amounted to approximately \$14.5 billion.

AGENTS AND CO-CONSPIRATORS

41. The acts alleged against the defendants in this Complaint were authorized, ordered, or done by their officers, agents, employees or representatives, while actively engaged in the management or operation of defendants' business or affairs.

42. Various other persons, firms or corporations not named as defendants may have participated as co-conspirators with the named defendants in the violations alleged herein and may have performed acts and made statements in furtherance thereof.

43. Each defendant acted as the principal, agent or joint venturer of, or for, other defendants with respect to the acts, violations and common course of conduct alleged by plaintiffs.

CLASS ACTION ALLEGATIONS

44. Plaintiffs bring this action on behalf of themselves and as a class action pursuant to Federal Rules of Civil Procedure 23(a) and (b)(3) on behalf of the following Class:

1 All persons or entities who purchased title insurance in California
2 directly from the defendants, their subsidiaries, agents and/or
3 affiliates, or any co-conspirator, from the earliest date allowable by
4 law through the present (the "Class Period").

5 Specifically excluded from this Class are the defendants; the officers,
6 directors or employees of any defendant; any entity in which any
7 defendant has a controlling interest; and any affiliate, legal
8 representative, heir or assign of any defendant. Also excluded are any
9 federal, state or local governmental entities, any judicial officer
10 presiding over this action and the members of his/her immediate
11 family and judicial staff, and any juror assigned to this action.

12 45. This action has been brought and may properly be maintained on behalf of the Class
13 proposed above under the criteria of Rule 23 of the Federal Rules of Civil Procedure.

14 46. **Numerosity.** Members of the Class are so numerous that their individual joinder is
15 impracticable. It is estimated that the Class consists of thousands of members.

16 47. **Existence and predominance of common questions.** Common questions of law and
17 fact exist as to all members of the Class and predominate over questions affecting only individual
18 Class members. These common questions include:

- 19 a. Whether defendants engaged in a contract, combination or conspiracy among
20 themselves and/or their co-conspirators to raise, fix, and maintain the prices of
21 title insurance sold in California;
- 22 b. The identities of the co-conspirators;
- 23 c. The duration of the conspiracy and nature and character of the acts done in
24 furtherance of the conspiracy;
- 25 d. Whether the conspiracy violated Section 1 of the Sherman Act;
- 26 e. Whether defendants actively concealed the contract, combination or conspiracy
27 from plaintiff and other Class members;
- 28 f. Whether the conduct of defendants and their co-conspirators caused prices of
title insurance premiums to be artificially inflated to non-competitive levels;
and
- g. Whether plaintiffs and other members of the Class were injured by the conduct
of defendants and their co-conspirators and, if so, the appropriate class-wide
measure of damages and appropriate injunctive relief.

1 48. **Typicality.** Plaintiffs' claims are typical of the claims of the Class in that Plaintiffs
2 bought title insurance from one of the defendants and, like all Class members, were damaged by the
3 wrongful conduct of defendants and their co-conspirators, and seek relief common to the Class.

4 49. **Adequacy.** Plaintiffs are adequate representatives of the Class because their interests
5 do not conflict with the interests of the members of the Class they seek to represent. Plaintiffs have
6 retained counsel competent and experienced in complex class action litigation, and intend to prosecute
7 this action vigorously. The interests of the members of the Class will be fairly and adequately
8 protected by Plaintiffs and their counsel.

9 50. **Superiority.** A class action is superior to all other available methods for the fair and
10 efficient adjudication of this controversy because joinder of all members is impracticable.
11 Furthermore, as the damages suffered by individual Class members may be relatively small, the
12 expense and burden of individual litigation makes it impossible for members of the Class to
13 individually redress the wrongs done to them. There will be no difficulty in the management of this
14 case as a class action.

15 51. In the alternative, the Class may be certified because:

- 16 a. The prosecution of separate actions by the individual members of the Class
17 would create a risk of inconsistent or varying adjudications with respect to
18 individual Class members and would establish incompatible standards of
19 conduct for defendants;
- 20 b. The prosecution of separate actions by individual Class members would create
21 a risk of adjudications with respect to them that would, as a practical matter, be
22 dispositive of the interests of other Class members not parties to the
23 adjudications, or substantially impair or impede the ability of other Class
24 members to protect their interests; and
- 25 c. Defendants have acted or refused to act on grounds generally applicable to the
26 Class, making final injunctive relief or corresponding declaratory relief with
27 respect to the members of the Class as a whole an appropriate form of relief.
28

1 52. Plaintiffs reserve the right to expand, modify, or alter the class definition in response to
2 information learned during discovery.

3 **TRADE AND COMMERCE**

4 53. During the Class Period, defendants were the major sellers of title insurance in the
5 United States and California. Defendants controlled in excess of 85 percent of the market for title
6 insurance in the United States and approximately 92 percent of the statewide market in California.

7 54. During the Class Period, defendants sold substantial quantities of title insurance in a
8 continuous and uninterrupted flow of interstate commerce, including through and into this judicial
9 district.

10 55. During the Class Period, Class members located outside of and within California
11 purchased commercial or residential property and title insurance within California.

12 56. The activities of defendants and their co-conspirators, as described here substantially
13 affected interstate trade and commerce in the United States, and in the State of California, and caused
14 antitrust injury in the United States and in California.

15 **FACTUAL ALLEGATIONS**

16 57. Defendants are competitors in the sale of title insurance to consumers throughout the
17 United States, including California. They agreed and engaged in concerted efforts to (i) collectively
18 set and charge supra-competitive rates for title insurance; (ii) include agency commission costs in their
19 calculated rates; (iii) embed within these costs payoffs, kickbacks, and other charges that are unrelated
20 to the issuance of title insurance; and (iv) hide these supposed "costs" from regulatory scrutiny by
21 funneling them to and through title agents over which the government agencies have no ability or
22 authority to regulate.

23 **I. The Nature of Title Insurance**

24 58. Title insurance differs from other, more familiar kinds of insurance. Unlike automobile
25 and homeowner insurance policies that protect consumers from events that may occur in the future,
26 title insurance offers protection from events that might have occurred in the past and may affect the
27 title to the real estate that a consumer is buying.

1 59. Title insurance, therefore, protects the purchaser of a property from unidentified defects
2 in the title that would interfere with the full ownership and use of the property and the ultimate right to
3 resell the property. Possible title defects include errors or omissions in deeds, mistakes in examining
4 records, forgery, undisclosed heirs, missing heirs, liens for unpaid taxes, and liens by contractors.

5 60. There are two basic types of title insurance policies – the lender’s policy and the
6 owner’s policy. The lender’s policy is issued to the lender and will pay the lender the remaining
7 principal on the loan if there is a title problem that cannot be resolved. The owner’s policy is issued to
8 the buyer of the property for the full purchase price of the property. Consequently, the maximum
9 liability on a title insurance policy is the purchase price of the property.

10 61. In a typical home purchase, both a lender’s policy and an owner’s policy are issued.
11 Lenders require a lender’s policy whenever there is a loan associated with the real estate transaction.
12 The lender’s policy continues in force until the loan is extinguished, and the owner’s policy continues
13 until the property is sold.

14 62. With a refinancing transaction, the existing lender’s policy is terminated and a new
15 lender’s policy is issued. The existing owner’s policy remains in place. The lender does not pay for
16 the lender’s policy in a purchase or refinancing transaction. The premium may be paid by the buyer or
17 seller in a purchase transaction, and by the owner in a refinancing transaction.

18 63. Title insurers do not compete on the basis of the policies or coverage that they provide.
19 In fact, almost all title policies are based on a single set of form policies published and maintained by
20 the American Land Title Association, the title insurance industry’s national trade association.
21 Moreover, the end goal of an exhaustive title search by a title insurer is not to provide coverage for
22 title defects that the search uncovers, but rather to exclude coverage for any such defects and,
23 therefore, further reduce the real value of the title policy that is written to cover only unknown defects
24 in the title at the time of issuance. As a result, title insurance is a homogenous, commodity product.
25 There is no substantive, if any, difference between a policy offered by one company in comparison to
26 a policy offered by another company for the same property transaction.

27 64. Title insurance is one of the most costly items associated with the closing of a real
28 estate transaction, aside from the purchase price of the property. In California, rates for title insurance

1 are based on a percentage of the total value of the property being insured. For residential properties,
2 this price ranged in 2005 from about \$1,010 (for a \$250,000 property) to about \$1,490 (for a \$500,000
3 property). For more expensive homes and commercial properties, these prices are significantly
4 higher. The amount consumers spent on title insurance in California rose dramatically from
5 approximately \$700 million in 1995 to about \$3.1 billion in 2004.

6 65. Title insurance companies recognize that consumers generally lack the means to make
7 independent decisions regarding the scope, terms and price of title insurance. Title insurance referrals
8 are typically made by lawyers, mortgage brokers, lenders, realtors or other professionals who take part
9 in the transaction, and the cost of title insurance premium is presented to the consumer in the closing
10 statement at the time of closing. Typically, consumers do not shop around or negotiate the price for
11 title insurance. As a result of these dynamics, the supply and demand principles that would apply in a
12 competitive market are not implicated, and the title insurance industry is not subject to any meaningful
13 competitive constraints.

14 66. The title insurance market in California is dominated by five groups of affiliated
15 companies, that when combined, sell approximately 92 percent of the title insurance policies sold in
16 California, and that own and control the "title plants" in many California counties that every title
17 insurer must rely on to issue title policies. "Title plants" contain information regarding property
18 transfers and liens reaching back many years.

19 67. Title companies, in marked contrast to property, casualty, life, and other traditional
20 insurance carriers, choose not to market their products directly to consumers who pay for them.
21 Instead, the title insurance industry operates on what is termed a "reverse competition" model.
22 Reverse competition means that title companies solicit business referrals from the other major players
23 in the home purchase scenario – real estate agents and agencies, banks, lenders, builders, developers,
24 and others such as middlemen or go-betweens. The title companies pay middlemen for these referrals
25 in the form of direct payments, advertising expenses, junkets, parties, and other kickbacks and
26 inducements. In addition, middlemen such as Windermere, John L. Scott, and Coldwell Banker-Bain,
27 who themselves control a substantial portion of the real estate brokerage market, take significant
28 ownership stakes in local title agencies and affiliates of the major title insurers. These middlemen

1 then profit be receiving a direct monetary return from the referral of title business to the title agent in
2 which they maintain an ownership interest.

3 68. Reverse competition does not benefit consumers through market-driven forces.
4 Instead, companies spend much of their marketing budgets entertaining real estate agents, banks,
5 lenders, builders, developers, and others in an effort to convince these middlemen to steer the home-
6 buying clients to their companies for the clients' title insurance needs.

7 69. Rather than seek to capture business by offering lower prices, title insurers offer
8 kickbacks in the form of finder's fees, gifts, meals, business services, and other financial enticements.
9 As a result, title insurers compete and increase their business through higher pricing (that allows for
10 generous inducements and kickbacks) not lower pricing to consumers.

11 70. In some of the major markets in the United States, these same title insurers collectively
12 meet, jointly set rates, and file these rates with the applicable state insurance authority. The rates are
13 not subject to any meaningful review or regulation. The companies agree to fix the price of title
14 insurance far in excess of the risk and loss experience associated with such insurance. As a result of
15 the joint agreement as to rates, competition is relegated to the middleman, and therefore, no title
16 company competes on price to the consumer.

17 71. In addition to paying inducements and kickbacks, the title insurance companies and
18 their agents divide the market of real-estate middlemen through the use of Affiliated Business
19 Arrangements ("ABAs"), where the dominant real estate brokers purchase significant ownership
20 stakes in favored title insurance affiliates. The real estate brokers then reward their associates for
21 using the preferred title insurance providers and lock out independent title insurers.

22 72. Having agreed to fix prices in states where joint rate-setting occurs, the companies
23 agreed not to compete based on price to the consumer in other states, including California, where
24 regulation of filed rates is lax or non-existent. Thus, title insurance companies agree to set prices at
25 supra-competitive levels and to compete based on offering inducements to middlemen.

26 73. One example of competing based on illegal kickbacks to middlemen came to light in
27 July 2005, when nine major title companies reached an agreement with the California Department of
28 Insurance to pay \$37.8 million in refunds and penalties for illegal rebating where national

1 homebuilders, lenders, and realtors were encouraged to steer business to particular title insurers. The
2 nine companies were members of three insurance groups, all three of which are defendants here –
3 LandAmerica Financial Corporation, The First American Title Insurance Company, and Fidelity
4 National Financial, Inc.

5 74. Under the arrangement, the homebuilder formed a reinsurance company affiliate – a
6 captive reinsurer. Then, under an agreement with the title insurer, the homebuilder would steer the
7 consumer to the title insurer and the title insurer would cede a portion of the premium – typically 50%
8 after the first \$200 to \$300 – to the captive reinsurer with no substantive risk of loss associated with
9 the reinsurance transaction. In effect, the arrangement allowed for the title insurer to rebate 50% of
10 the premium to the homebuilder.

11 75. As a result of this scheme, the companies were accused of paying \$25.4 million in
12 illegal kickbacks to various lenders, builders, and realtors in exchange for the referral of title insurance
13 business. Their actions involved more than 82,000 California households that purchased or refinanced
14 a home between 1997 and 2004.

15 76. In March 2005, the U.S. Department of Housing and Urban Development (“HUD”)
16 determined that 80% or more of the premium paid by a consumer for title insurance frequently goes to
17 the local title agent or lawyer who ordered the policy and may be running the closing.

18 **II. Lack of Regulatory Supervision in California**

19 77. In California, there is a lack of regulatory authority and oversight over title insurance
20 companies. The rates in California are not set as part of deliberate state intervention, and the state
21 does not meaningfully renew or approve these rates. The rates at issue in this case went into effect
22 without review.

23 78. Although the California Office of the Insurance Commissioner (“OIC”) found an
24 “astonishing number” of kickbacks and similar inducements in violation of state law, it does not
25 actively oversee or regulate rates, and, does not, by its own admission, have the power to do so. The
26 absence of regulation in California has allowed and continues to allow collusive behavior and
27 excessive rates to flourish at the expense of the consumers.

28

1 79. In February 2007, Steve Poizner, the Insurance Commissioner of California, issued a
2 statement concluding that "reasonable price competition does not exist for title and escrow services."
3 (*Insurance Commissioner Steve Poizner Issues Statement Following Decision by OAL on New*
4 *Regulations*, California Department of Insurance, February 22, 2007.)

5 80. Poizner's press release goes on to state that the costs of the illegal inducements that
6 title companies lavish on intermediaries to obtain the homeowner's business are passed on to the
7 homeowner. Indeed, Poizner's press release states: "As a result, over the past 10 years, even though
8 technology has lowered the costs of title searches and document production, title and escrow charges
9 have not come down. In fact, title insurance on the average home in California costs roughly double
10 what it cost 10 years ago, despite the fact that [title insurance] companies' production costs have
11 plummeted."

12 81. A report to the California Insurance Commissioner prepared during December 2005 by
13 Birny Birnbaum, Consulting Economist, found abuses of the lack of regulatory supervision in this
14 state. For instance, his report states: "We found numerous examples in California of illegal rebates
15 and kickbacks where the title insurer or the underwritten title company provides money, free services
16 or other things of value to a real estate agent, a lender or homebuilder in exchange for business
17 referrals." (*An Analysis of Competition in the California Title Insurance and Escrow Industry*,
18 December 2005, p.3.)

19 82. The excess money paid to title agents not only works to steer business to defendants,
20 but also serves to boost defendants' profits through the inflated revenues they obtain to cover the
21 agency payments, and through their ownership or management stake in many of these agencies.

22 **III. Indicators of a Lack of Competition and Conditions Conducive to Collusive Rate Setting**

23 **A. Low or Declining Title Search Costs**

24 83. The bulk of the title insurance premium goes to expenses as opposed to claim
25 payments. Title insurers paid an average of 4.6 percent of premiums for claims and claim settlement
26 expenses from 1995 to 2004, compared to around 80 percent of the total premium collected for
27 property and casualty insurance. Title searches have become less labor intensive, especially in large
28 urban counties and cities, as more of the pertinent information regarding claim of title is available

1 online. As a result, the costs of production and the risk of loss have decreased. None of these factors
2 resulted in price competition at the consumer level, however.

3 84. Despite declining costs of production, increased number of transactions and increased
4 revenue per transaction, there have been few rate changes by title insurers over the past five years.
5 During a period when costs per unit of production declined, underwritten title companies and title
6 insurers maintained excessive rates. That prices charged by title insurers and underwritten title
7 companies were not and are not responsive to the changing costs of production or increasing revenue
8 per transaction at a given set of rates is evidence of an agreement not to compete based on price.

9 **B. Title Premiums Include Improper Payments, Commissions and Inducements**

10 85. The defendant title companies provide illegal rebates and kickbacks where the title
11 insurer or the underwritten title company provides money, free services, or other things of value to a
12 real estate agent, a lender, or homebuilder in exchange for business referrals. These illegal rebates and
13 kickbacks – a consequence of reverse competition – show that title insurance rates are supra-
14 competitive.

15 **C. Market Dominance and Lack of Competition Based on Price to Consumer**

16 86. The volume of the California title insurance transactions is substantial. The number of
17 residential title transactions exceeded 3 million during 2004 alone. Commercial property transactions
18 are in addition to this volume.

19 87. The title insurance market is highly concentrated – few title insurers account for the
20 vast majority of title insurance sales – at both the statewide level and at the county level in California.
21 For example, the five defendant families controlled approximately 92 percent of the California title
22 insurance market in 2005.

23 88. Defendants have maintained their market dominance and ability to control prices for
24 title insurance in part because of the substantial barriers to entry in the market. Between 1995 and
25 2005, the number of title insurer groups declined as title insurers acquired other title insurers. Few
26 companies entered the title insurance business during the period from 2000 through 2005.

27 89. Access to title plants is a barrier to entry. Established relationships between entities
28 that steer consumers to title insurance sellers is an additional barrier to entry.

1 90. As a result of their market dominance and anti-competitive practices, defendants enjoy
2 excessive profits at the expense of the consumers. For example, title insurance underwriters earned
3 after-tax profits of 49.0 percent in 2003 and 32.3 percent in 2004.

4 **IV. Price Fixing in Other Large Markets that Affect California**

5 91. New York is one of several states in which the leading title insurers collectively fix
6 their prices through a rate-setting organization known as the Title Insurance Rate Service Association,
7 Inc., or TIRSA. TIRSA collects from defendants and TIRSA's other members revenue and cost
8 information and annually submits it in aggregate form along with collectively set title rates to the New
9 York Insurance Department. Under this rate setting regime, defendants have charged identical and
10 collectively fixed rates to consumers since TIRSA's inception in 1991.

11 92. The New York Insurance Department is charged with reviewing the title rates that
12 defendants (through TIRSA) collectively fix. Defendants have made this impossible, however, by
13 manipulating the rates so that they are principally based on costs over which the Insurance
14 Department has neither the authority nor the ability to assess.

15 93. Under TIRSA's collective rate setting regime, roughly 85 percent of the total title
16 insurance premiums are based on the so-called "costs" associated with the payment of agency
17 commissions. These costs are referred to as so-called "agency commissions." As in California, these
18 commissions chiefly include kickbacks and other costs unrelated to the issuance of title insurance.
19 Instead, as in California, these supposed costs are funned to and through title agents to increase
20 defendants' overall business and get them more business.

21 94. New York Insurance Law does not authorize TIRSA to include kickbacks and other
22 agency commission payments that are unrelated to the issuance of title insurance in its collectively
23 fixed rates. The New York Insurance Department has acknowledged, however, that it lacks the
24 authority to review any agency commission payments and, therefore, cannot properly evaluate
25 TIRSA's calculated rates.

VIOLATIONS ALLEGED

First Claim for Relief

(Violation of Section 1 of the Sherman Act)

95. Plaintiffs incorporate and reallege each and every allegation in the preceding paragraphs of this complaint.

96. Beginning at a time presently unknown to Plaintiffs, but at least as early as May 2004, defendants and their co-conspirators engaged in a combination and conspiracy in unreasonable restraint of trade and commerce in violation of Section 1 of the Sherman Act, 15 U.S.C. § 1.

97. The combination and conspiracy consisted of a continuing agreement, understanding and concert of action among defendants and their co-conspirators, the substantial terms of which were:

- a. To fix, raise, maintain and stabilize the price of title insurance throughout California;
- b. To fix, raise, maintain and stabilize the terms and conditions of sale of title insurance in California; and
- c. To allocate and divide the market for title insurance in California.

98. In the absence of proper regulatory authority and oversight, defendants' conduct constitutes a horizontal agreement to fix the form, structure, and prices of title insurance and to allocate and divide the title insurance market in California which is a *per se* violation of Section 1 of the Sherman Act.

99. Defendants' price fixing, market allocation, and division activity has been continuous throughout the relevant damages period and has been renewed and reinforced annually through submissions to the OIC of supposed cost and revenue information and its periodic submissions of rate changes.

100. Through their collective price-fixing, market allocation and division, as well as manipulation of the regulatory process, defendants harmed competition by charging consumers supra-competitive prices for title insurance in California, evidenced by the uniformly higher prices as compared to the cost of providing the title insurance.

102. During the period of the antitrust violations by defendants and their co-conspirators, Plaintiffs and each member of the Class they represent purchased title insurance and, by reason of the antitrust violations alleged here, paid more for such than they would have paid in the absence of the antitrust violations. As a result, Plaintiffs and members of the Class have been injured in an amount presently undetermined.

(Violation of the California Cartwright Act)

104. Defendants' contract, combination, trust or conspiracy was centered in, carried out, effectuated and perfected mainly within California, and defendants' conduct within California injured all members of the Class throughout the United States. Therefore, this claim for relief under California law is brought on behalf of all members of the Class, whether or not they are California residents.

20

CLASS ACTION COMPLAINT

1 106. The violations of Sections 16720, *et seq.* of the California Business and Professions Code
2 consisted of a continuing unlawful trust and concert of action among the defendants and their co-
3 conspirators, the substantial terms of which were to fix, raise, maintain and stabilize the prices of, and to
4 allocate markets for title insurance in the state of California.

5 107. For the purpose of forming and effectuating the unlawful agreement, defendants and their
6 co-conspirators did those things which they combined and conspired to do, including the acts, practices
7 and course of conduct alleged above and the following:

- 8 a. To fix, raise, maintain and stabilize the price of title insurance;
9 b. To allocate markets for title insurance amongst themselves; and
10 c. To allocate and divide the market for title insurance in California.

11 108. The combination and conspiracy alleged here had the following effects:

- 12 a. Price competition in the sale of title insurance has been restrained,
13 suppressed and/or eliminated in California and throughout the
14 United States;
15 b. Price for title insurance sold by defendants and their co-
16 conspirators have been fixed, raised, maintained and stabilized at
17 artificially high, non-competitive levels in California and
18 throughout the United States; and
19 c. Those who purchased title insurance from defendants and their co-
20 conspirators have been deprived of the benefit of free and open
21 competition.
22

23 109. Plaintiffs and the other members of the Class paid supra-competitive, artificially inflated
24 prices for title insurance.

25 110. As a direct and proximate result of defendants' unlawful conduct, Plaintiff and the
26 members of the Class have been injured in their business and property because they paid more for title
27 insurance than they otherwise would have paid in the absence of defendants' unlawful conduct.
28

111. As a result of defendants' violation of Sections 16720, *et seq.* of the California Business and Professions Code, Plaintiffs seek treble damages and the costs of suit, including reasonable attorneys' fees, pursuant to Section 16750(a) of the California Business and Professions Code.

Third Claim for Relief

(Violation of the California Unfair Competition Law)

112. Plaintiffs incorporate and reallege each and every allegation in the preceding paragraphs of this complaint.

113. Defendants' business acts and practices were centered in, carried out, effectuated and perfected mainly within California, and defendant's conduct within California injured all members of the Class throughout the United States. Therefore, this claim for relief under California law is brought on behalf of all members of the Class, whether or not they are California residents.

114. During the Class Period, and continuing to the present, defendants committed and continue to commit acts of unfair competition, as defined by Sections 17200, *et seq.* of the California Business and Professions Code, by engaging in the acts and practices specified above.

115. This Claim is instituted pursuant to Sections 17203 and 17204 of the California Business and Professions Code, to obtain restitution from defendants for acts that violated Sections 17200, *et seq.* of the California Business and Professions Code, commonly known as the Unfair Competition Law.

116. Defendants' conduct violated Section 17200. The acts, omissions, misrepresentations, practices and non-disclosures by defendants constituted a common continuous and continuing course of conduct of unfair competition by means of unfair, unlawful and/or fraudulent business acts or practices within the meaning of California Business and Professions Code, Sections 17200, *et seq.*, including the following:

- a. Defendants' acts and practices violate Section 1 of the Sherman Act and Section 16720, *et seq.*, of the California Business and Professions Code, set forth above;
- b. Defendants' acts and practices are unfair to consumers of title insurance in California and throughout the United States within the

1 meaning of Section 17200 of the California Business and
2 Professions Code; and

3 c. Defendants' acts and practices are fraudulent or deceptive within
4 the meaning of Section 17200 of the California Business and
5 Professions Code.

6 117. Plaintiffs and each of the Class members are entitled to full restitution and/or
7 disgorgement of all revenues, earnings, profits, compensation, and benefits that may have been obtained
8 by defendants as a result of their illegal business acts or practices as alleged here.

9 118. The illegal conduct alleged here is continuing and there is no indication that defendants
10 will not continue such activity into the future.

11 119. The unlawful and unfair business practices of defendants, as described above, caused
12 Plaintiffs and the members of the Class to pay supra-competitive and artificially-inflated prices for title
13 insurance. Plaintiffs and the members of the Class suffered injury in fact and lost money or property as
14 a result.

15 120. Plaintiffs request that this Court enter such order or judgment as may be necessary to
16 enjoin defendants from continuing their unfair, unlawful, and/or deceptive practices, to restore to them
17 and the Class members any money that may have been unjustly acquired by defendants by means of
18 defendants' unfair competition.

19
20 **PRAYER FOR RELIEF**

21 WHEREFORE, Plaintiffs and the members of the Class pray for relief as follows:

22 A. That this action be certified and maintained as a class action under Rule 23(a) and
23 (b)(3) of the Federal Rules of Civil Procedure;

24 B. That the unlawful conduct, contract, conspiracy or combination alleged here be
25 adjudged and decreed to be an unreasonable restraint of trade or commerce in violation of Section 1 of
26 the Sherman Act;

1 C. That Plaintiffs and the Class recover damages, including treble damages, and
2 restitution, as provided by federal and state antitrust and unfair competition laws, and that a joint and
3 several judgment in favor of Plaintiffs and the Class be entered against the defendants;

4 D. That defendants, their affiliates, successors, transferees, assignees, and the officers,
5 directors, partners, agents, employees, and all other persons acting or claiming to act on their behalf,
6 be permanently enjoined and restrained from in any manner: (1) continuing, maintaining, or renewing
7 the conduct, contract, conspiracy or combination alleged here; (2) entering into any other conspiracy
8 similar to the ones alleged here; (3) entering into any other contract, conspiracy or combination having
9 similar purpose or effect; and (4) adopting or following any practice, plan, program, or device having
10 a similar purpose or effect;

11 E. That Plaintiffs and the Class be awarded pre-and post-judgment interest, and that the
12 interest be awarded at the highest legal rate from and after the date of service of the initial complaint
13 in this action;

14 F. That Plaintiffs and the Class recover their costs of this suit, including reasonable
15 attorneys' fees as provided by law; and

16 G. That Plaintiffs and the Class have such other, further and different relief as the case
17 may require and the Court may deem just and proper under the circumstances.

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JURY DEMAND

Plaintiffs demand a trial by jury on all claims so triable.

DATED: July 14, 2008

Respectfully submitted,

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